UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SEPTEMBER 11 LITIGATION	No.: 21 MC 101 (AKH) This Document Relates To: All Cases

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT UNITED AIR LINES, INC.'S MOTION FOR A PROTECTIVE ORDER PRECLUDING THE DEPOSITION OF JULIE E. ASHLEY

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I. INTRODUCTION

Defendants United Air Lines, Inc. and United Continental Holdings, Inc. (f/k/a UAL Corporation) (collectively "United") seek a protective order pursuant to Federal Rule of Civil Procedure 26(c) barring Plaintiffs from deposing United employee Julie E. Ashley or listing her as a witness to be called to testify at trial because she has no relevant testimony to provide and her deposition would amount to nothing more than a fishing expedition and a tool for harassment. In the course of discovery in this case, Plaintiffs have taken a number of depositions of United employees fishing wildly for evidence of negligence. No such evidence has come from any of those depositions. It is time that that practice comes to a halt, as Plaintiffs have not demonstrated a good faith basis for deposing Ms. Ashley or believing that her deposition would lead to the discovery of admissible evidence.

On September 11, 2001, Ms. Ashley was the Manager of United's Customer Baggage Services. She had no aviation security-related responsibilities. Shortly after September 11th, Ms. Ashley's husband, Dr. Ahmad Farid Khorrami, became the subject of a government investigation but was ultimately cleared of any wrongdoing. Since Ms. Ashley's deposition was first requested, United has used its best efforts to repeatedly explain to Plaintiffs that Ms. Ashley possesses no relevant information. However, Plaintiffs have continued to pursue Ms. Ashley and have most recently identified Ms. Ashley as a witness that may be called in the trial scheduled in the matter of *Bavis v. United Air Lines, Inc., et al*, Case No. 02 Civ 7154 and noticed her deposition for January 24, 2011.[1]

Over the course of the last two years, Plaintiffs have articulated a number of reasons for wanting to depose Ms. Ashley, including their belief that: (1) she publicly-lectured on security issues for United; (2) her husband was a student in the same flight school as one or more of the hijackers; (3) her husband lived in the same apartment complex as and had contact with one or more hijacker; (4) her husband had been jailed for four months following September 11, 2001; (5) Ms. Ashley had visited her husband's apartment complex; and (6) most recently, that FBI records will show that a call was placed from Ms. Ashley's cell phone on September 11, 2001 to Mohammad Atta's cell phone. As discussed in more detail, and as evidenced by Ms. Ashley's sworn affidavit and other materials attached as exhibits hereto, there is no support for any of Plaintiffs' asserted bases for deposing Ms. Ashley and no reason allow Plaintiffs to proceed with this deposition. Rather, it is clear that Ms. Ashley does not now and has never possessed any personal knowledge, information, experience or expertise relevant to this litigation.

Therefore, this Court should enter a protective order precluding Plaintiffs from deposing Ms. Ashley and listing her as a witness to be called at trial. Quite simply, allowing this deposition to go forward would turn discovery into a tool for harassment and create a needless distraction from the important work to be done in the little time remaining for the parties to complete discovery and prepare for trial. Further, allowing Plaintiff to list Ms. Ashley as a trial witness will likely require United to pursue an appeal from an anticipated government denial of requests for FBI documents and depositions to create admissible evidence debunking Plaintiff's anticipated bad-faith examination of Ms. Ashley.

II. STATEMENT OF FACTS

A. Ms. Ashley Has Not Had Security Responsibilities.

While Ms. Ashley has been a long-time employee of United, her experience has not included any responsibilities related to civil aviation security, United's security program or

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[1] On January 19, 2001, counsel for United informed *Bavis* counsel that due to unavailability Ms. Ashley would not be produced on January 24, 2011. Should this Motion be denied, United will endeavor to produce Ms.

checkpoint screening. On September 11, 2001, Ms. Ashley was employed by United as the Manager of Customer Baggage Services. Exhibit A, Declaration of Julie E. Ashley at ¶3. Ms. Ashley had been employed by United in this capacity since January 1999, working outside of the airport setting at United's Chicago Reservation facility. *Id.* Her duties included overall responsibility for United's Bag Desk, which responded to customer baggage claims, including managerial oversight of its employees and budgetary responsibility for its operations. *Id.* None of Ms. Ashley's duties as of September 11th included the handling of civil aviation security or checkpoint screening issues, or required any knowledge thereof. *Id.*

Prior to this position, Ms. Ashley held a variety of other positions within United's Baggage Services organization, the Reservation and Ticketing Sales organization, and as a Tariff Auditor. Ex. A, Ashley Decl. at ¶¶4-5. None of her responsibilities in any of the positions she has held within these organizations included safety or security issues or required Ms. Ashley to be familiar with United's civil aviation security program or checkpoint screening procedures. *Id.* She never performed any duties related to civil aviation security or checkpoint screening, and never served as a Customer Service Representative at an airport ticket counter or as a Ground Security Coordinator. *Id.*

Finally, Ms. Ashley has never publicly lectured on any issues related to civil aviation security or checkpoint screening on behalf of United. Ex. A., Ashley Decl. at ¶7. As the Manager of Customer Baggage Services for United, Ms. Ashley did participate in a Worldwide Airline Customer Relations Association conference in the Fall of 2002 and presented a workshop titled "Baggage Security Removed Items: Policies, Procedures and Education." *Id.* at ¶8. This workshop, however, was entirely unrelated to aviation security or checkpoint screening issues and instead focused entirely on dealing with airline passengers from a customer relations

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Ashley for deposition at a mutually agreed-upon and convenient time.

standpoint who were unhappy or had concerns about having to remove items or have items removed from their carry-on luggage that were no longer permitted under the post-September 11th security measures. *Id.*

B. The FBI Admits Its Investigation Into Ms. Ashley's Husband Was In Error.

Ms. Ashley husband is a native of Iran. He and Ms. Ashley married on July 6, 2000. Ex. A, Ashley Decl. at ¶9. In August 2000, he applied for legal permanent residence and received advanced parole authorization from the INS in February 2001. *Id.* Shortly after September 11, 2001, while employed by Skyway Airlines as a pilot, he was questioned by the FBI and the INS and eventually taken into custody. *Id.* at ¶¶9-11. During the course of his three-month incarceration, the INS canceled his advance parole and began proceedings to have him removed from the country. *Id.* at ¶11.

According to an affidavit submitted by the FBI during a November 2001 immigration hearing, the basis of the FBI's investigation into Ms. Ashley's husband was (1) a suspected link between the flight school at which he had previously been an instructor and some of the 9/11 hijackers; and (2) a suspicion that he had resided in the same apartment building in Daytona Beach, Florida as one of the hijackers on American Airlines Flight 11. Ex. A, Ashley Decl. at ¶12. The FBI, however, informed Ms. Ashley that as of September 21, 2001, the connection between the flight school at which her husband had taught and any of the suspected hijackers had been refuted. *Id.* at ¶13. Further, on December 11, 2001, the FBI acknowledged in writing that Waleed A. Al-Shehri, the individual that had lived in the same Daytona Beach apartment building as Ms. Ashley's husband, was not the same person as Waleed M. Al-Shehri, the American Airlines Flight 11 hijacker, and therefore the statement in the earlier FBI affidavit was incorrect. *Id.* at ¶14; *see also* Exhibit B, Dec. 11, 2001 letter from T. Kneir and T. Gossfield to the Executive Office of

Immigration Review. Following this acknowledgement, Ms. Ashley's husband was released from custody. Ex. A, Ashley Decl. at ¶14. Essentially, he was the victim of a cruel case of mistaken identity.

After his release and the FBI's acknowledgement of its error, Dr. Khorrami received permanent residency status, was cleared by the FAA and TSA to fly airliners, and ultimately became a United States citizen on December 10, 2008. *Id.* at ¶15.

C. Plaintiffs' Proffered Bases For Requesting Ms. Ashley's Deposition.

United has long objected to Plaintiffs' request to depose Ms. Ashley and have repeatedly requested an explanation as to the basis of Plaintiffs' request. In November 2008, counsel for Plaintiffs indicated that they wished to depose Ms. Ashley because they believed: (1) she had publicly-lectured on security issues for United; (2) she flew to Florida to get married to a Middle Eastern man who was a student in a flight school of interest to them; (3) her husband received a phone call from a hijacker on 9/11 and lived in the same apartment complex and on the same floor as some of the 9/11 hijackers; (4) her husband had been jailed for four months by the United States of America; and (5) her husband met and knew one of the hijackers. *See* Exhibit C, Nov. 4, 2008 E-Mail from Don Migliori to Loretta Redmond. Therefore, Plaintiffs asserted that they wanted " to know what Mrs. Khorammi knew about Mr. Khorammi's relationship and association with the 9/11 hijackers" and "exactly what she told United Airlines and the FBI about what she knew about her husband's associations or anyone else in his apartment complex or flight school, why he was called by Atta and subsequently jailed for four months." *Id.*

After investigating Plaintiffs' claims, United maintained its objection to Plaintiffs' request for Ms. Ashley's deposition and informed Plaintiffs that there was nothing to their asserted reasons for deposing Ms. Ashley: (1) she neither had publicly lectured on security issues

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for United, nor had any checkpoint screening responsibilities during her employment with United; (2) Mr. Khorammi's arrest and detention was based on the FBI's mistaken confusion of Mr. Waleed Ahmed Al-Shehri for the American Airlines Flight 11 terrorist Waleed Mohammed Al-Shehri in the early days of investigation after September 11, 2001 and provided several documents to Plaintiffs substantiating those facts; and (3) Mr. Khorammi had never in fact been in contact with any 9/11 hijacker. *See* Exhibit D, Feb. 11, 2009 E-Mail from Loretta Redmond to Don Migliori and attachments thereto.

Despite being notified that the factual bases that they had offered for Ms. Ashley's deposition were demonstrably false, Plaintiffs renewed their request in June 2009. Plaintiffs' then-stated reasons for pursuing the deposition were a desire to explore who Ms. Ashley met at Mr. Khorammi's apartment building and her alleged participation in a program involving checkpoint security. *See* Exhibit E, Aug. 27, 2009 E-Mail from Michael R. Feagley to Douglas J. Pepe. Counsel for United again explained to Plaintiffs that: (1) the FBI concluded that the individual of concern who lived at Mr. Khorammi's apartment complex was in fact not a hijacker, but someone with a name similar to one of the hijackers; and (2) the "checkpoint security" program to which Plaintiffs' referred was actually a 2002 customer service presentation that Ms. Ashley gave on how to handle customers who were upset that that they were carrying an object that could not (post-9/11) be allowed through the security checkpoint. *Id.* Plaintiffs again refused to withdraw their request, offering the non-sequitur that "[t]he fact that Mr. Khorammi was not charged with a crime and has sued and made public much of the details of his ordeal, does not supplant our right to inquire of Ms. Ashley's potential contact with hijackers." *Id.*, at Sept. 10, 2009 E-Email from Mary Schiavo to Michael R. Feagley.[2]

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[2] In response, United supplied its portion of a 2E letter to Plaintiffs on October 1, 2009 in order to bring this issue to your Honor's attention, again reiterating that all of the reasons that Plaintiffs' sought Ms. Ashley's

In Plaintiff's May Call Witness List provided in the matter of *Bavis v. United Air Lines, Inc.*, Case No. 02 Civ. 7154 on November 20, 2010, Plaintiff again identified Ms. Ashley as a witness to be deposed and potentially called at trial. Counsel for United sent yet another letter to Plaintiff asking that this request be withdrawn given the demonstrably false bases which Plaintiff have offered to date. *See* Exhibit G, Dec. 23, 2010 Letter from Michael R. Feagley to Don Migliori. In Plaintiff's Revised May Call Fact Witness List, served on January 4, 2011, the reason for Ms. Ashley's inclusion was stated as:

> Julie Ashley, aka Julie Khorammi, was and is believed to still be a United Airlines baggage security employee. Her husband was in flight school in Florida and he lived in the same apartment building complex in Florida as the hijackers, and Ms. Ashley/Khorammi frequented the apartment complex. Her deposition has been requested (and was also previously requested and noticed) and we anticipate her testimony will be about topics on which she will be deposed.

See Exhibit H, Plaintiff's Revised May Call Fact Witness List, served January 4, 2011. As of that submission, counsel for United had previously informed Plaintiffs no less than four times that Mr. Khorammi had never lived in the same apartment complex as any 9/11 hijacker and any belief that he did was based on a case of mistaken identity, as well as provided documents on numerous occasions to support those conclusions. Counsel for Plaintiff's decision to continue to assert these erroneous facts as the basis for seeking Ms. Ashley's deposition and appearance at trial is inexplicable.

Even more inexplicable, however, is Plaintiff's most recent and surprising revelation of a new reason for taking Ms. Ashley's deposition. On January 12, 2011, counsel for Plaintiff sent a letter to the Department of Justice stating that "[w]e believe that the FBI reports and records show that a call was placed from Julie Ashley's cell phone to hijacker Mohammad Atta's cell

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deposition were demonstrably false. *See* Exhibit F, Oct. 1, 2009 E-Mail from Courtney L. Anderson to Timothy S. Tomasik. However, in light of the stay imposed in the Fall of 2009 as a result of the property damage settlement negotiations, Plaintiffs never supplied their portion of that letter.

phone on or about September 11, 2001." *See* Exhibit I, Jan. 12, 2011 Letter from Mary Schiavo to Jeannette A. Vargas. Such an egregious allegation against Ms. Ashley has never once been uttered during the more than two years that the parties have been discussing Plaintiffs' desire to depose her, and there is simply no factual basis to support the statement.[3]

While discovery is intended to be broad, it does have its limits. Plaintiffs should not be permitted to pursue this baseless fishing expedition. The record disproves any good faith basis for pursuing the deposition of Ms. Ashley and as explained in more detail below, United's motion to preclude her deposition and inclusion on Plaintiffs' trial witness list should be granted.

III. THIS COURT SHOULD PRECLUDE PLAINTIFFS FROM DEPOSING MS. ASHLEY AND LISTING HER AS A WITNESS TO BE CALLED AT TRIAL.

The Federal Rules of Civil Procedure set reasonable limits on discovery. *See* FED. R. CIV. P. 26(b)(2)(C); *see also Treppel v. Biovail Corp.*, 2006 WL 468314, at *1-2 (S.D.N.Y. Feb. 28, 2006) (stating that Rule 26(b)(2) "authorizes courts to restrict discovery"). Those limits are enforceable through the entry of a protective order. *See* Fed. R. Civ. Proc. 26(c)(1) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (A) forbidding the disclosure or discovery . . . .").

Rule 26(b)(2)(C) of the Federal Rules of Civil Procedure sets forth the circumstances under which a court is required to limit discovery. Specifically, the Rule mandates that:

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[3] Upon receipt of the Jan. 12, 2011 letter, United promptly requested that Plaintiff produce all documents supporting this allegation and pointed out that any information supporting such a theory was called for under long-standing discovery requests. *See* Exhibit J, Jan. 18, 2011 Letter from Courtney L. Anderson to Mary Schiavo. Notably, the government also requested this same information from Plaintiffs in response to their latest revelation. To date, however, United has neither received any supporting documentation from Plaintiff nor any response to its inquiry. To the extent that this Motion is denied, Plaintiffs should be required to immediately produce all materials supporting their stated bases for deposing Ms. Ashley and identify all sources thereof.

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> > (iii) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(C).

As explained below, this Rule supports the entry of a protective order preventing the deposition of Ms. Ashley. Ms. Ashley clearly does not possess any personal knowledge relevant to this litigation, and the burden and continuing harassing effect of her deposition as an innocent victim of circumstances clearly outweighs any potential benefit. Further, allowing this deposition to go forward will needlessly distract the parties from the important work left to complete relevant discovery and to prepare for trial in the short time remaining before the scheduled June 13th trial date.

First, Ms. Ashley cannot offer any testimony regarding United's pre-9/11 security program or checkpoint screening. In fact, Ms. Ashley has absolutely no experience with or knowledge about these issues. As of September 11, 2001, she was an employee with United's Baggage Services organization—not charged with any security-related responsibilities. Similarly, her tenure with United prior to September 11th was spent entirely in non-security related capacities. She has never served as a ticket counter customer service representative, ground security coordinator, as a screener or a member of a flight crew for United. Ms. Ashley herself in no way professes to be knowledgeable about United security issues or checkpoint screening, and the workshop presentation that Ms. Ashley gave in the fall of 2002 was entirely unrelated to security issues but rather a matter of customer relations.

Further, the government's post-9/11 investigation seems to have concluded that Ms. Ashley's husband is not a terrorist and has never had any ties to the 9/11 hijackers. Therefore, any testimony that Ms. Ashley could offer about her or her husband's activities pre-9/11 or her knowledge of the government's investigation of her husband post-9/11would be entirely irrelevant to the claims and defenses at issue in this case. The U.S. government itself has conceded that the bases of its investigation of Ms. Ashley's husband were erroneous.

Further, the testimony that Ms. Ashley would offer would ultimately be inadmissible at trial. Ms. Ashley could only testify as to what the FBI told her and what it told her spouse in writing—that the suspected link between the flight school at which her husband had previously been an instructor and some of the 9/11 hijackers had been refuted, and that any suspicion that he had resided in the same apartment building in Daytona Beach, Florida as one of the hijackers on American Airlines Flight 11 was based on a case of mistaken identity. That testimony would be hearsay. It would also be irrelevant to what this Court has stated will be the focus of the trial against the Aviation Defendants and therefore barred under Federal Rule of Evidence 402. *See In re: September 11th Litigation*, 21 MC 101 (AKH), 2009 WL 2052540, *6 (S.D.N.Y. July 16, 2009) (Opinion & Order Resolving Discovery and Evidentiary Motions); FED. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

Ms. Ashley's testimony is also not reasonably calculated to lead to the discovery of admissible evidence and therefore beyond the scope of discovery permitted by the Federal Rules. FED. R. CIV. PROC. 26(b)(1).

Finally, there is absolutely no good-faith basis for the very serious and injurious allegation that Plaintiffs have now lodged against Ms. Ashley—that a call was placed from Ms. Ashley's cell phone to Mohammad Atta on or about September 11, 2001. Ms. Ashley's declaration avers that she never called Mohammad Atta or any other hijacker on September 11, 2001, or at any other time. Ex. A, Ashley Decl., ¶17. Nor is she aware of any one else making such a phone call from her cell phone at any time. *Id.* Beyond Ms. Ashley's own denials, there is absolutely no mention of Mohammad Atta or any other hijacker receiving a phone call from Ms. Ashley's cell phone in the 9/11 Commission Report. Further, Ms. Ashley herself has never been the subject of investigation or detained by the FBI, or had any charges levied against her related to the events of September 11, 2001. Certainly, if the allegations made by counsel for Plaintiff were supported by any documentation in the government's possession, some action would have been taken against Ms. Ashley. None ever has. Furthermore, if Plaintiff has information to the contrary, and has been withholding it from discovery, such misconduct also would be grounds to bar her proposed deposition.

Given the absence of connection to the underlying issues in this litigation, Plaintiffs' continued pursuit of Ms. Ashley's deposition is indefensible and should be prohibited. *See In re IBM Corp. Securities Litig.*, 163 F.3d 102, 111 (2d Cir. 1998) (rejecting additional discovery where information sought was only "minimally relevant" to Plaintiffs' underlying claims); *Cronas v. Willis Group Holdings, Ltd.*, 2008 WL 4548861, at *2 (S.D.N.Y. Oct. 8, 2008) (disallowing discovery beyond local practices in employment case where "there is no evidence that ... centralized policies and practices had any discriminatory effect on the terms of plaintiffs' employment" and explaining that "[t]o the extent that nationwide discovery is remotely relevant to plaintiffs' claims, the burden of production outweighs its likely benefit"). Plaintiffs' pursuit of this deposition amounts to nothing more than a fishing expedition and harassment, which courts are clear should not be permitted. *See, e.g., Collens v. City of New York*, 222 F.R.D. 249, 252-53 (S.D.N.Y. 2004) (citations omitted) ("[w]hile Rule 26(b)(1) still provides for broad discovery, courts should not grant discovery requests based on pure speculation that amounts to nothing more than a 'fishing expedition' into actions or past wrongdoing not related to the alleged claims or defenses.").

Like the other fishing expeditions that Plaintiffs have previously pursued into the claims of Greg McAleer and into United's Pilot-for-a-Day Program, Plaintiffs' stubborn insistence on pursuing this baseless course against Ms. Ashley suggests that Plaintiffs realize that their case is week and plaintiff if floundering. Such recognition, however, provides no basis for allowing Plaintiffs to proceed on their current desperate course, and latitude in this case should not be granted. Precluding Ms. Ashley's deposition is consistent with the interests of the Rules of Civil Procedure in balancing benefits with burdens. The protective order that United is seeking will prevent discovery from being used as a tool for harassment where Plaintiffs have no "reasonably founded hope that the process will reveal relevant evidence." *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

IV. RULING ON THIS ISSUE NOW WILL DETERMINE WHETHER ADDITIONAL FACT DISCOVERY IS NECESSARY.

An order prohibiting the deposition of Ms. Ashley and barring Plaintiffs from calling her to testify at trial, for the reasons described above, will reduce the fact discovery that will need to completed prior to the scheduled June 13, 2011 trial date in this case. To the extent that the deposition of Ms. Ashley is allowed to go forward or that Plaintiffs are permitted to call her as a trial witness, United must develop additional evidence to rebut any connection asserted by Plaintiff between Ms. Ashley and her husband to the events of September 11th at trial.[4] To the extent that Plaintiff now reveals information or documents it has been withholding from discovery, it may lead to further investigation as well. United has already issued requests for the production of certain records as well as the depositions of the FBI agents who were involved in the investigation of Ms. Ashley's husband and who determined that the bases for that investigation were erroneous. To date, a final determination of United's discovery requests has not been issued. Assistant United States Attorney, Sarah S. Normand, has indicated to counsel for United that United's requests are likely to be denied. Should such a denial come to fruition, United will need to pursue an appeal of that decision or otherwise be left without the ability to develop additional evidence to rebut any connection asserted by Plaintiff between Ms. Ashley and her husband to the events of September 11th at trial, providing yet another reason to prevent Plaintiffs' from pursuing this line of inquiry and proof.

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[4] As stated above, United believes that Plaintiffs' efforts to depose Ms. Ashley and call her as a witness at trial is nothing more than an exercise in harassment and a fishing expedition. Accordingly, United plans to file at the appropriate time a motion seeking to bar Plaintiff from offering any evidence related to Ms. Ashley or any of the other fishing expeditions that United that have yielded no relevant evidence (for example, the deposition of Greg McAleer and the multiple depositions regarding United's Pilot-for-a-Day program) from being admitted into evidence at trial.

V. CONCLUSION

For all the reasons set forth above, this Court should grant United's Motion for a Protective Order precluding the deposition of Julie E. Ashley and barring Plaintiff from listing Ms. Ashley as a witness to be called at trial. Should United's Motion be denied, Plaintiff should be required to immediately produced all materials supporting there alleged bases for deposing Ms. Ashley and identify all sources thereof.

Dated: January 25, 2011

Respectfully submitted,

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